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IN THE

Supreme Court of the United States

October Term, 1966

No. 157

MORRIS KOLITCH and ALVIN REISCH,

Petitioners,

against

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for Rehearing of Order on Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department

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BERNARD JAY COVEN,
Of Counsel.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Morris Kolitch and Alvin Reisch respectfully pray for a rehearing of the order on their petition for a writ of certiorari to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Department. The latter judgment affirmed a conviction for wrongfully concealing stolen property, in consequence of which your petitioners were sentenced to terms of imprisonment, and also affirmed an order denying a motion to suppress evidence claimed to have been illegally seized.

This Court denied the petition for a writ of certiorari on October 10, 1966.

The present application is presented by petitioners in conformity with Rule 58 of the Rules of this Court, namely, because of intervening circumstances and additional substantial grounds of controlling effect.

In addition to the points urged in the original petition, the Court's attention is directed to the following:

ARGUMENT.

POINT I

The questions herein having arisen on a trial which took place between the rendition of the *Escobedo* and *Miranda* decisions, petitioners are entitled to the benefit thereof.

The holdings of this Court in several cases decided since the filing of the petition herein (in May, 1966) give rise to a new question calling for determination. In this connection the following chronology must be noted:

June 22, 1964; announcement of decision in *Escobedo* v. *Illinois,* 378 U. S. 478.

October 8-20, 1964; trial of case at bar.

June 13, 1966: decision in *Miranda* v. *Arizona,* 384 U. S. 436.

June 20, 1966: decisions in *Johnson* v. *New Jersey,* 384 U. S. 719, and *Davis* v. *North Carolina,* 384 U. S. 737.

In *Escobedo,* briefly, it was held that the use in evidence of incriminating statements elicited from a suspect in custody who has been denied an opportunity to consult counsel and has not been effectively warned of his constitutional rights, is a violation thereof.

In *Miranda* the same governing principles were elaborated, the Court stressing that the law guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will" during a period of custodial interrogation, and prescribing other detailed safeguards. Certiorari was admittedly granted in that case "in order further to explore some facets of the problems."

In *Johnson* and *Davis*, the Court held that *Escobedo* and *Miranda* applied only to cases in which the trial began after the dates of the respective decisions, and not to trials completed before they were rendered. Even there (*Johnson*, p. 730; Davis, p. 740) it was pointed out that "the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

As indicated in the chronology above, the instant case was tried during the two-year period between *Escobedo* and *Miranda*. Since *Miranda* is manifestly an elaboration and an establishment of more precise guidelines to govern the questions involved, we submit that a trial occurring after *Escobedo*, although before *Miranda*, should logically be considered in the light of the later exposition of the law. No reasonable justification can be presented for viewing the argument regarding denial of rights in a limited judicial fashion that blinds itself to the ultimate and more exact principles that were finally enunciated.

The present case is not *sui generis* so far as the time of trial is concerned. There are undoubtedly other prosecutions which were determined during the same two-year interval, and it would be most helpful if the Court were to clarify the pertinent rule. It is suggested that the doctrine most conducive to justice would be that trials in the

interim referred to are subject to *Escobedo* as later explained and particularized by *Miranda*. The application of the complete law herein immensely fortifies the contentions heretofore advanced by petitioners.

POINT II

The use of data alleged to have been supplied by an unidentified informer was a prejudicial invasion of petitioners' rights.

Without reiterating the argument previously urged on this score, we desire to point out that the United States Court of Appeals for the Fifth Circuit recently held, in *McMillan* v. *United States,* 363 F. 2d 165 (unofficial advance sheets of September 26, 1966), that an officer's testimony that he recognized an automobile as one described by a reliable informant, was so prejudicial to the appellants as to be reversible error despite instructions to the jury to disregard it. The Court there referred to decisions in other circuits to like effect.

Herein the references to the alleged informant were far more explicit (A33, 34, 35, 42, 45, 48, 52), and motions attacking the objectionable proof (A74, 145-152) were unsuccessful. The result was not only a conviction based on hearsay, but an arrant denial of the right of confrontation.

A review by this Court of the question presented would be eminently desirable, and would afford petitioners the plenary opportunity to contest rulings so plainly at variance with established law.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the original petition, a rehearing should be allowed, and on such rehearing a writ of certiorari granted.

October 24, 1966.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

BERNARD JAY COVEN,
Of Counsel.

CERTIFICATE OF COUNSEL

The undersigned, attorney for petitioners, hereby certifies that the foregoing petition is presented in good faith and not for delay.

October 24, 1966

JACOB W. FRIEDMAN,
Attorney for Petitioners.